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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

No. 30.

---

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, *Appellant*,

vs.

WILLIAM A. SCHNADER, Attorney-General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania, *Appellees*.

## MOTION ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

COME Now, Mark Graves, John J. Merrill and John P. Hennessey, constituting the Tax Commission of the State of New York, and move this Honorable Court for leave to file the annexed brief as *amici curiæ*.

SETH T. COLE,
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Office and Post-Office Address,
Room 530, State Office Building,
Albany, N. Y.

IN THE

SUPREME COURT OF THE UNITED STATES

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CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, *Appellant,*

vs.

WILLIAM A. SCHNADER, Attorney-General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania, *Appellees.*

# BRIEF ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK AS *AMICI CURIAE.*

## Statement.

This case is here on appeal from the United States District Court for the Eastern District of Pennsylvania, which dismissed a bill of complaint in equity seeking an injunction restraining the appellees, as officers of the Commonwealth of Pennsylvania, from assessing and collecting inheritance taxes from the appellant in the estate of Thomas B. Clarke, deceased.

Inasmuch as the facts of the case are before the Court upon the record and have been summarized in the briefs of the parties, it is deemed unnecessary to recite them in detail here.

The question at issue is whether the collection of portraits owned by Mr. Thomas B. Clarke during his lifetime, which in 1928 were loaned by him to the Philadelphia Museum of Art for exhibition purposes, and which remained on exhibition in said museum up to the time of his death on January 18, 1931, are subject to the death or inheritance tax of the Commonwealth of Pennsylvania, by virtue of such portraits having acquired an actual situs in said Commonwealth with such a degree of permanency as to divorce them from the operation of the law of the State of New York, in which state Mr. Clarke was domiciled, and subject them to Pennsylvania law; in other words, the question is whether the transfer of said portraits upon the death of the owner was effected by the law of New York, on the one hand, or by the law of Pennsylvania, on the other.

## Argument.

### POINT I.

**The collection of portraits owned by Mr. Thomas B. Clarke at the time of his death, which he had loaned to the Philadelphia Museum of Art, had its situs at his domicile in New York and the transfer thereof was effected by New York Laws. For these reasons the Commonwealth of Pennsylvania is without jurisdiction to impose a death or inheritance tax.**

It is well settled by the decisions of this Court that, as between states of the Union, the one which has jurisdiction to impose a death tax upon the privilege of succession from a decedent is that state under the laws of which the transfer is effected. No other state may exact a death tax, with a possible exception, based upon so-called "business situs," which is not here involved and need not be considered.

*Frick v. Pennsylvania*, 268 U. S. 473;
*First National Bank of Boston, Executor of Haskell v. State of Maine*, 284 U. S. 312.

It is conceded that the portraits, the death taxation of the transfer of which is involved in this proceeding, had a permanent situs in the State of New York prior to the time they were shipped to Philadelphia. It also seems to be agreed by the parties that if thereafter these portraits acquired such a situs in Pennsylvania that the law of that state accomplished their transfer upon Mr. Clarke's death, either directly or by recognition of the law of New York (*Frick v. Pennsylvania*,

*supra),* the asserted right of Pennsylvania to tax such transfer must be upheld, but that if they had only a temporary location in Pennsylvania and retained their permanent situs at the testator's domicile in New York, they were transferred upon his death pursuant to the laws of that state, and are subject to death taxation there. Hence, it must be decided whether upon the facts of the case, the paintings had lost their permanent situs in New York and acquired a new permanent situs in Pennsylvania.

It is now settled by the decisions of this Court that the transfer of real property can be subjected to death taxation only by the state of its situs, and also that intangible personal property (with the possible exception of such as may have a business situs in a state other than that of the owner's domicile) has its situs at the domicile of the owner and that the transfer thereof by reason of the owner's death may be taxed only by the state of such situs. With respect to tangible personal property, the trail is not so clearly blazed. If tangible personal property has an actual or permanent situs in a state other than that of the owner's domicile, the toll of death duties with respect thereto must be paid to the state where it is so situated, and, of course, if its actual or permanent situs be in the state of the owner's domicile, it may be there subjected to death taxation and not elsewhere. But, where tangible personal property at the time of the owner's death is physically in a state in which he was not domiciled, for a temporary period or purpose and without intent of permanency, it is believed that control of death taxation of the transfer of such property rests

with the state of domicile and not with the state where such tangible personal property is physically located, because, as a matter of law, the actual or permanent location of such property continues to be at the owner's domicile.

As is pointed out in appellant's brief, from a legal standpoint the question here involved is closely analogous to that of domicile. That is to say, the *domicile* of the property must be determined. A person's domicile of origin persists until it is shown to have been changed, and two things are necessary to establish a change, viz., actual residence elsewhere than at the domicile of origin, plus an intention to make such residence the domicile. The rule with respect to the situs of tangible personal property should be, and is believed to be, similar. Not alone should it be required that there be physical presence of the property away from the owner's domicile, but it should be coupled with an intent on the part of the owner that it should have an actual or permanent situs where so located, such intent to be established by reference to all the facts and circumstances of the case, as is done where the domicile of a person is at issue.

That the intent of the owner may affect the status of property cannot be questioned. A common example of the application of this principle is found in the rule of law applicable to fixtures. This rule is summarized in 26 Corpus Juris 654, as follows:

> "In the modern cases it is usually stated that whether an article or structure is part of the realty is primarily a question of the intention with which it was annexed or put in position, it being

> a part of the realty if there was an intention to make it a permanent accession to the land, and only then."

If tangible personal property may become real property or retain its character as tangible personal property, dependent upon the intention with which it is annexed to real property, there being no physical difference in the one case or the other, so far as the annexation is concerned, it would seem that the intention should play a prominent part in determining whether tangible personal property has acquired a permanent situs in one place or another. In other words, intent affects status and must also be held to affect situs.

The decedent, Mr. Clarke, was a patron of the arts, and at great expense and effort, over a period of years, had had assembled the finest collection of early American portraits in existence, a collection that was and is of world wide interest and of great value. He kept these paintings at his domicile in New York but was generous in making them available to public inspection by loaning them from time to time for exhibition on various occasions. Even while the collection was on exhibition at Philadelphia, he loaned part of it for exhibition in Virginia. His act in loaning the collection to the Philadelphia Museum of Art was not primarily one of his own volition. He did so at the solicitation of his old time friend, Dr. Kimball, and in connection with the opening of the Museum, of which his friend was the director. He made the loan without charge or expectation of recompense, although no doubt he could have secured substantial sums for the

use of the collection by other institutions. It appears very clearly from the record that he had no intention whatsoever that during his ownership the paintings should remain in Philadelphia permanently, but always intended that they should be returned to their regular place of custody at his home and domicile in New York. Although the record shows that Mr. Clarke expressed a willingness to sell the collection under certain specified conditions, it is thought that this fact is of no importance so far as the issue here is concerned.

The appellees properly suggested in their argument at an earlier stage of this proceeding that works of art are of no value if locked up and concealed from public view, but rank with the proverbial light hidden under a bushel. The real value of art is its display where people may see it. Fortunate is any community to be peopled by men and women who have a knowledge and appreciation of the fine arts. When Mr. Clarke consented to the exhibition of his collection in Philadelphia, he conferred a great boon, not alone on that city but on the entire State of Pennsylvania, whose metropolis Philadelphia is. His act materially added to the cultural development of the people of the City of Philadelphia and the State of Pennsylvania, but, if the taxing authorities of the state succeed in their effort to exact the taxes here in controversy, the effect can only be to discourage like generosity on the part of others.

The policy of the Commonwealth of Pennsylvania with respect to public art exhibits is shown by its statute exempting bequests or art objects for such purposes from death taxation (Act of July 9, 1919, P. L.

794, as amd. by Act of June 12, 1931, P. L. 553—pp. 5-6 of Record). This statutory provision is persuasive evidence that the Legislature of Pennsylvania never intended to tax the transfer of such objects merely because they happened to be on exhibition in that state at the time of the owner's death.

The value of the paintings was $714,750, upon which the annual increment would be, say, $35,000. This sum Mr. Clarke gave freely and willingly for the benefit of Pennsylvania and Pennsylvanians. In reciprocation, the taxing authorities of that state seek to compel the payment of a ten per cent tax by the beneficiaries of his will. Public policy and the encouragement of others to emulate Mr. Clarke's example should be strongly persuasive to a decision that will not impose a penalty for his bounty.

The temporary character of the location of the portraits in Philadelphia is manifested when it is borne in mind that they were originally loaned for use only in connection with the formal opening of the museum. There can be no doubt but that during the time of the opening exhibition the presence of the paintings in Pennsylvania was only temporary and of a transitory character. Thereafter, from time to time, Mr. Clarke requested their return, but on each occasion, at the earnest solicitation of Dr. Kimball and because of the great appreciation shown by the Pennsylvania public, he consented to leave the paintings at the museum for a further temporary period. Altogether the paintings had been on exhibition at the museum for approximately two years and ten months prior to the decedent's death. The original loan was

not for that period, or for any definite period, and actually was intended to be for a much shorter time. The fact that several requests for the return of the paintings were made during the period of the loan establishes that the decedent did not intend to leave them in Philadelphia for any extended period of time. Furthermore, since several such requests were made, it must have been that only a short time intervened between each request. If necessary to support a decision in favor of appellant, this Court might well find that each request for the return of the collection was sufficient to establish a new date from which to compute the time element to be taken into consideration in determining the question of the acquisition of permanent situs in Pennsylvania.

Appellees have sought to make some point of the fact that immediately after making the loan of the portraits, Mr. Clarke gave up the storage place in New York where most of them had been kept. Suffice it to say that storage space in warehouses in New York is seldom at a premium, and there was, of course, no good reason why Mr. Clarke should continue to pay for storage which he was not using. Any suggestion that Mr. Clarke profited because of having been relieved from the payment of storage would, of course, be absurd.

It is well established that the character and use of tangible personal property has much to do with the determination of the question of whether or not it has acquired a permanent situs when separated from the domicile of the owner.

(See *Irvin v. N. O., St. L. & C. R. R. Co.*, 94 Ill. 105.)

Reference is made to a Pennsylvania decision, which seems to have attained the status of a leading case, since it has frequently been referred to with tacit approval in opinions of this Court. This decision is *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386, in which it appeared that a Pennsylvania corporation owned certain dredges and a tug boat and scows which were located outside the State of Pennsylvania. The corporation was assessed for taxation upon its capital stock, including the value of these vessels, although they had not been within the limits of the state during the entire tax year. It objected to the inclusion of the value of the vessels in its capital stock, upon the ground that since they were without the state and had never been within it, they were not liable to taxation by the state. It was held that the value of this tangible personal property was properly subjected to tax, the Court saying (p. 391):

> "It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another state, it would be liable to taxation there. But the facts show that it is not permanently located out of the state. From the nature of the business, it is in one place today and in another tomorrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or inter-state commerce is that their situs for the purpose of taxation is their home port of registry or the residence of their owner, if unregistered; Pullman Palace Car Co., 29 Fed. Rep. 66; Hays v. Pacific Mail Steam-Ship Co., 17 How. 596. These vessels, if they may be so called, were not registered. Hence, their situs for taxation is the domicile of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in

> another state as to be liable to taxation under the laws of that state."

It is common knowledge that dredging operations, particularly at seaports, frequently extend over a long period of time. Sometimes dredges and the tug boats and scows operated in connection with them are engaged for several years on one operation. Therefore, it would seem that the case last cited is direct authority to substantiate the contention made by appellant.

In *Delaware, L. & W. R. R. Co. v. Pa.*, 198 U. S. 341, a case which denied the right of Pennsylvania to tax a corporation on coal mined in that state but which had been taken out of the state never to be returned, the *American Dredging Co.* decision was discussed and distinguished by this Court at page 356, as follows:

> "The asserted transitory nature of this property" [the coal] "does not seem to us to be material. At the time of the appraisement it had been transported beyond the jurisdiction of the State, never to return in kind, but was intended to be sold in the foreign State. Such property is entirely unlike the property involved in *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386. That property consisted of vessels, or scows, or tugs, only temporarily out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any actual situs beyond the jurisdiction of the State itself."

It may be remarked that although it appeared in the *American Dredging Co.* case that the vessels were outside the State of Pennsylvania for at least the period of the taxable year, it did not appear for how long a

period in addition to that year that had been outside the jurisdiction. The Court apparently did not deem the length of time during which the property had been and would be out of the State important, but merely considered the temporary character of its absence from Pennsylvania. It is respectfully submitted that this is the correct rule, and that property may be temporarily without the borders of a state for an extended period of time without that state losing jurisdiction over it. The character of the property is an important evidentiary fact to be considered in determining whether the location without the state is permanent or temporary. Dredges, barges, etc., owned by a dredging company would have but a temporary location at the place of their employment in the business of the company, no matter how long they might be engaged there. So, too, paintings loaned by an art collector to a museum for exhibition with the understanding that they should be returned to him when the exhibition had been accomplished, would have only a temporary situs at the place where the exhibition was held, especially if the collector loaned them in the course of a custom which he had pursued for many years of exhibiting them at different places.

In considering this case, the works of art owned by Mr. Clarke are not to be regarded merely as paintings but as a collection of paintings, the only appropriate use of which is for exhibition to the public. They could only have value to him by reason of their use in such manner, just as the vessels of the dredging company could only be of use to it in transitory operations. To illustrate, Mr. Clarke might have stored his paintings in Pennsylvania, and, if so, they might have

acquired a permanent situs there because their use as exhibition pieces would have terminated. They could not, however, acquire a permanent situs in that state by reason of a temporary loan to the museum there, as their original situs was in New York, to which state they were to be returned in accordance with their owner's wishes and pursuant to his course of dealing with them.

In *Gromer v. Standard Dredging Co.*, 224 U. S. 362, Porto Rico attempted to tax certain machinery and boats which at the time the taxes were levied were in the harbor at San Juan engaged in dredging work in pursuance of a contract of the defendant with the United States Government. The defendant was a Delaware corporation. It did not appear how long the dredging machinery had been located in the harbor. The property was held to be taxable, but the prevailing opinion commented upon the fact that the question of temporary situs in the waters of Porto Rico had not been raised and was not in the case. Mr. Justice Day wrote a dissenting opinion, which was concurred in by Justices Hughes and Lamar. These Justices thought that the question of jurisdiction was important, and said (pp. 376-7):

> "It requires a showing that the property sought to be taxed is incorporated in or commingled with the property of the taxing authority, before it can become liable to taxation in any other jurisdiction than that of the domicile of the owner. *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386 (see *infra*).
>
> "The decisions in this court indicate that personal property of a tangible character, to become taxable, must have acquired a *situs* of a permanent nature within the jurisdiction of the author-

> ity seeking to levy the tax. The use of the term 'permanent' in this connection may not mean the continued and unchangeable location of the property at a given place, but certainly does intend to include the idea of location which is not of a temporary or fleeting character."

The opinion continues (p. 379):

> "Tangible personal property is taxable at the owner's domicile, except where it is shown to have an actual *situs* elsewhere, and, as we have seen, actual *situs* is not gained when the property comes only temporarily within the taxing jurisdiction. Applying this test, we are of the opinion that this dredging outfit had not become incorporated into the personal property of the Territory of Porto Rico, as manifestly it was there temporarily only. In our judgment this situation falls far short of a location in Porto Rico sufficient to subject it to the taxing power of that Territory."

The fact that the language above quoted is contained in a dissenting opinion is not an indication that the views expressed were contrary to those of the majority of this Court, for the question of temporary situs was not in the case, and therefore the majority refrained from reference to it.

The views of Justices Day, Hughes and Lamar were in accord with the decision of this Court in *Morgan v. Parham*, 16 Wall. 471, which involved an attempt by the State of Alabama to impose a tax upon a coasting vessel plying between Mobile and New Orleans. This Court said (p. 476):

> "It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal prop-

> erty of that State, but was there temporarily only."

The vessel in the *Morgan* case was in regular trade between Mobile and New Orleans, and undoubtedly was in Mobile for a substantial portion of the year. It is entirely possible that the aggregate period during which it was in Alabama was far in excess of the period during which the Clarke paintings were in Pennsylvania. The case turned upon the point that the vessel had not become incorporated into the personal property of Alabama. Likewise, it cannot be said that the paintings of Mr. Clarke had become incorporated into the personal property of Pennsylvania.

The majority opinion in the Court below finds support for its conclusions in *Blodgett v. Silberman*, 277 U. S. 1, where certain bank notes and coin in a safe deposit box in New York, belonging to a decedent who was domiciled in Connecticut, were held to have an actual situs in New York so as not to be subject to death taxation in Connecticut. This decision was in accord with the decision in *Gromer v. Standard Dredging Co., supra,* and is distinguishable on the same grounds that the latter case has been distinguished in the foregoing argument, viz., that there was no evidence to show that the bank notes and coin were not in New York permanently, whereas here there is ample evidence to establish that the portraits were only temporarily in Pennsylvania.

Another decision closely in point is that in *Joiner v. Pennington*, 143 Ga. 438. There the facts indicate that a portable saw mill had been taxed in a county

other than that in which the owner had his domicile. It was alleged that the mill had been for a year in the county in which it was taxed. The Court said that even so its location in the taxing county might have been only temporary. It further said (p. 440):

> "If the mill is actually a portable saw mill, remaining only temporarily in the place to which it may be carried for operation, and if as a matter of fact it is carried from county to county, then it is clearly taxable as personal property, belonging to the owner in the county of Jefferson, that is, the county of petitioner's" [the owner's] "residence * * *."

It is obvious that it was the character of the saw mill and the nature of its use which governed the Court in its decision and not the element of time. If the location away from the domicile of the owner was temporary, even though it had existed for a year, it could have been temporary had it lasted for three years, if other conditions remained the same.

In *Capital Const. Co. v. City of Des Moines,* 211 Iowa, 1228, it appeared that the plaintiff, a contracting firm, had machinery in Illinois, where it was used on a construction project for a whole year, after which it was returned to Iowa. The plaintiff objected to a tax upon the value of the machinery in the State of Iowa. The Court in its opinion said (p. 1230):

> "The absence of the machinery from the state of Iowa, therefore, was only temporary, and not of a permanent nature."

For this reason the machinery was held to be taxable in Iowa.

In *Semple v. Commonwealth,* 181 Ky. 675, a resident of Texas complained of a tax in the State of Kentucky upon his furniture, automobile and bank account, which apparently had been in Kentucky for a considerable period of time and probably for at least a year. He frequently visited in Kentucky where he maintained an apartment under a yearly lease. At page 682 of the Court's opinion it was said:

> "In order that personal property may have a situs for taxation in a locality different from the domicile of its owner, such personal property must be permanently located at the place where it is sought to be taxed. No temporary location will alter its situs for taxation at a place other than the residence of its owner."

The furniture and automobile were held nontaxable.

The facts in the case at bar make it apparent that the portraits owned by Mr. Clarke were loaned by him to the City of Philadelphia for a purpose which wholly excluded the idea of the acquisition by them of a permanent situs in Pennsylvania.

It is true that the maxim *mobilia sequuntur personam* has not at all times been applied in the same way. It had its birth at a time when the great mass of personal property was tangible, but its application to that class of property has been modified to the extent that it is held not to apply where tangible personal property has acquired an actual and permanent situs away from the domicile of the owner (see *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194). The maxim still applies with respect to tangible personal property which has not acquired a permanent situs away from the domicile of the owner, even though

it may never actually be found at the domicile of the owner (see *Southern Pacific Company v. Kentucky,* 222 U. S. 63). With respect to intangible personal property, which was almost unknown when the maxim originated, it applies with full force and vigor, at least so far as death taxation is concerned (see *First National Bank of Boston, Executor of Haskell, v. State of Maine,* 284 U. S. 312, *supra).* The point is that the maxim is applied by the courts when it is necessary to apply it in order to prevent injustice. The instant case would seem to be one in which it is necessary to apply it in order to prevent a gross injustice.

To illustrate how great an injustice might result if appellant is denied the relief it seeks, suppose that under the law of Pennsylvania bequests of personal property could be made only to direct heirs and that bequests to collaterals were invalid. Assume further that the testator, a resident of New York, bequeathed the paintings to collateral relatives. Would this Court say that the will was invalid and that the wishes of the testator must be frustrated merely because of the fact that during his lifetime, moved by a spirit of philanthropy, he had seen fit to loan the paintings for exhibition in Pennsylvania? Or would it decide that such was a case where in order to prevent injustice the *mobilia sequuntur personam* maxim should be applied so as to permit the wishes of the testator to be carried into effect? If the bequest under such circumstances would be held valid, the same considerations dictate that Pennsylvania be denied the right to tax the paintings, because the basis of death taxation is the granting by a state of the right of succession.

This Court has never held that tangible personal property which is only temporarily away from the owner's domicile may not be taxed by application of the *mobilia sequuntur personam* rule, and it is respectfully urged that no such doctrine should be enunciated in this case.

The decision of this Court in *Frick v. Pennsylvania*, 268 U. S. 473, *supra*, upon which considerable stress is laid by appellees, may be distinguished in very few words. In that case, there was no question of the permanency of the location of the tangibles involved, for they were situated in part in an art gallery built for their reception in the City of New York and in part at the summer home of the decedent. Of course, tangible personal property so situated, with no intention of moving it to the domicile of the owner, is taxable where located. The case is entirely different from the one at bar.

The position of the Tax Commission of the State of New York in this brief is in accord with the law as it has been interpreted in the State of New York and does not represent a mere desire to obtain for New York the tax on the property here involved. In the *Estate of Charles W. Hawthorne*, Surrogate Foley of New York County, on June 9, 1931, made an order exempting from taxation the transfer in the estate of a non-resident of New York of paintings loaned by him for exhibition to an art gallery in the City of New York. Mr. Hawthorne's domicile was in the State of Massachusetts. He was the owner of a collection of paintings which he was accustomed to send to differ-

ent art gallaries throughout the country for exhibition purposes. His death occurred on November 29, 1930. At that time, and for several years prior thereto certain of his paintings had been on exhibition at the Grand Central Art Galleries in New York City. This institution sometimes exhibited the paintings in their own galleries in New York and sometimes sent them to be exhibited in other art galleries. Mr. Hawthorne, himself, from time to time withdrew some of his paintings from the custody of the Galleries and exhibited them elsewhere. At the time of his death, forty-eight of his paintings were on exhibition in New York. Under the regulations of the Galleries, Mr. Hawthorne was privileged to exhibit there such pictures as he chose and could withdraw any or all of them at any time.

The Grand Central Art Galleries is a New York membership corporation, not conducted for profit, and its purpose is to promote interest in art and encourage and assist living American artists. Its galleries are open to the public. Pictures loaned to it are displayed therein, and frequently special exhibitions are held of the works of different individual American artists.

The Surrogate of New York County made the order of exemption above referred to, although the facts did not present as strong a case for exemption from the New York tax as is presented by the facts before this Court for exemption from the Pennsylvania tax, inasmuch as it did not appear that the Hawthorne paintings had ever had a situs in Massachusetts before they were sent to New York.

Although the New York Tax Commission had the right of appeal from this order of the Surrogate, they acquiesced in the decision, believing that it was correct not only from the standpoint of law but also from that of public policy. Their action in filing this brief is consonant with and for the purpose of upholding the position so taken by them.

It is respectfully submitted that the decision below should be reversed and the prayer of the bill of complaint granted.

SETH T. COLE,
*Counsel for*
*Tax Commission of the*
*State of New York.*

# OPINION

# SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1934.

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, Appellant,
*vs.*
William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

[November 5, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

The Pennsylvania inheritance tax law imposes a tax upon the transfer by will or intestate laws of personal property within the Commonwealth when the decedent is a nonresident at the time of his death.* Thomas B. Clarke, a resident of New York, loaned paintings to a museum in Pennsylvania and died testate while they were on exhibition there. His will was admitted to probate in New York, and letters testamentary issued to appellant to which, as trustee, the residuary clause transferred the pictures. The appellees, acting respectively as attorney general and secretary of revenue of Pennsylvania, proceeded to appraise and assess the pictures for the purpose of collecting the inheritance tax.

*Section 1 of the Act of June 20, 1919, P. L. 521, 72 P. S. § 2301, as last amended by the Act of June 22, 1931, P. L. 690, provides in part as follows:

"Section 1. Be it enacted, etc., That a tax shall be, and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases:

. . . . . .

"(b) When the transfer is by will or intestate laws of real property within this Commonwealth, or of goods, wares, or merchandise within this Commonwealth, or of shares of stock of corporations of this Commonwealth or of national banking associations located in this Commonwealth, and the decedent was a nonresident of the Commonwealth at the time of his death."

Appellant, maintaining that when the owner died the paintings had no actual situs within Pennsylvania because only temporarily there, brought this suit to enjoin enforcement on the ground that, if the statute be construed to tax the transfer by the death of the nonresident owner, it is repugnant to the due process clause of the Fourteenth Amendment. As the transfer cannot be subjected to taxes imposed by more than one state (*Frick* v. *Pennsylvania*, 268 U. S. 473, 488-492. *Safe Deposit & T. Co.* v. *Virginia*, 280 U. S. 83, 93. *Farmers Loan Co.* v. *Minnesota*, 280 U. S. 204, 210. *First National Bank* v. *Maine*, 284 U. S. 312, 326-327.) appellant framed its complaint to call for a decision whether Pennsylvania or New York is entitled to the tax. The New York tax commission as *amicus curiae* filed briefs below and also in this court supporting the claim that the transfer is subject to the New York tax.

The district court, consisting of three judges, § 266, J. C., dismissed the suit on the ground that appellant had an adequate remedy at law. This court reversed and remanded the case with instructions to reinstate the bill and proceed to a hearing upon the merits. *City Bank Co.* v. *Schnader*, 291 U. S. 24. Then the case was submitted and tried on the facts alleged in the bill and answer and additional ones that were stipulated by the parties. Upon the circumstances detailed in its findings the court concluded that 79 portraits belonging to Clarke that were included in the collection on exhibition in the Pennsylvania museum at the time of his death then had an actual situs in that State, and held the transfer subject to the Pennsylvania inheritance tax.

The material substance of the findings follows:

In March, 1928, Clarke at the request of the director of the Pennsylvania museum, loaned to it the 79 pictures, together with 85 others owned by a corporation of which he was sole stockholder. At the time of the loan, they were, and long had been kept, in New York City. Five were at his residence, ten were on exhibition, and the remaining 64 were in storage. When the pictures were sent to Pennsylvania, Clarke surrendered his lease for the storage space and thereafter did nothing to secure another place in which to put them. But suitable space was always readily available in New York.

The arrangement with the museum was oral; no consideration was to be paid, and it was understood that at any time on Clarke's request the pictures would be returned to him. In the spring of

1929, Clarke wrote the director, at the latter's solicitation, that he would sell the entire collection at a stated price to anyone who would present it to the museum, it being understood that he would allow the pictures to remain at the museum for a reasonable time for the director to find such a donor. In May, 1930, he stated that this arrangement would terminate June 17, 1930. But at the director's request he permitted the pictures to remain, upon the understanding that, whenever he so requested, they would be returned to him in New York. Thereafter, he was willing to sell the collection as a whole for presentation to the Pennsylvania museum or to a substantially similar institution.

Clarke made no definite plans or request for the return to New York of the paintings. None was ever removed from the museum except four which, at his request, were sent to Virginia in April, 1929, for exhibition and were returned in May. When he died, January 18, 1931, all the paintings were at the museum.

The museum was not conducted for profit. It secured through voluntary loans from nonresidents a substantial portion of the works of art which it displayed. None of these was regarded or intended as a permanent loan. It is customary for public museums to secure pictures for exhibition in this manner. The period elapsing until Clarke's death was shorter than the usual period of such loans.

The power to regulate the transmission, administration and distribution of tangible personal property rests exclusively in the State in which the property has an actual situs, regardless of the domicile of the owner. If at the time of his death the actual situs of Clarke's pictures was in Pennsylvania, they were wholly under the jurisdiction of that State. The fact that being a resident of New York he, by will probated in that State, disposed of the pictures detracted nothing from the exclusive jurisdiction of Pennsylvania to tax the transfer effected by his death. New York laws had no bearing other than that attributable to their implied adoption by Pennsylvania. Assuming actual situs in Pennsylvania, the paintings there on exhibition when the owner died are not to be distinguished, so far as concerns the imposition of the inheritance tax, from land located within that State. *Frick* v. *Pennsylvania, supra,* 489-493.

We regard as unimportant and negligible Clarke's suggestions that the pictures be returned because on each occasion he acceded

to opposing suggestions of the director and continued his consent that they remain temporarily at the museum subject to his orders. Mere floating intention that sometime in the future the pictures would be returned to New York was not sufficient to retain them within the jurisdiction of that State and to keep them without the jurisdiction of Pennsylvania. Cf. Story, Conflict of Laws, 8th ed., § 46. And obviously without weight are the facts that Clarke made the loan without pay, gave up the warehouse in which he had kept some of the pictures and died without providing a place for them in New York.

The significant features of the transaction are these: Prior to the loan the pictures that went to make up the collection had an actual situs in New York. The loan was not made for a short and definite period and it was subject to the right of the owner to have the pictures returned to New York at any time. He did not call for their return but with his consent they were kept in Pennsylvania and there exhibited until he died two years and ten months after the loan. With the exception of the four pictures temporarily sent to Viriginia, none was taken from Pennsylvania. For nearly two years next preceding his death Clarke was willing—indeed, he authorized the director—to sell the collection to anyone who would buy at the specified price and donate them to the Pennsylvania museum. And during the last six months of his life he was willing to sell to any purchaser that would give them to any institution similar to the Pennsylvania museum. It does not appear that Clarke ever intended to have the pictures returned to New York at any definite date or upon the happening of any event or at all. Until his death he permitted the pictures to be kept and used in the Pennsylvania museum merely subject to his right at any time to order them taken to New York or elsewhere.

In respect of situs for taxation, the collection of portraits is quite unlike vessels and railway rolling stock that in fulfilling the purpose of which they are created move from place to place and into different States. Cf. *Hays* v. *The Pacific Mail Steam-ship Company*, 17 How. 596, 599. *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 23. *Johnson Oil Co.* v. *Oklahoma*, 290 U. S. 158, 161. Before the loan was made the pictures had an actual situs in New York, so as to be within the taxing power of that State, though it cannot be said that they were there permanently located in the

sense of that phrase when used in respect of land, buildings or other items of fixed real property. The location of the portraits in Pennsylvania was not merely transient, transitory or temporary but it was fixed in an established abiding place in which they remained for a long time. Undoubtedly, they became subject to the taxing power of the State. Cf. *Brown* v. *Houston*, 114 U. S. 622, 632-633. *Pittsburg &c. Coal Co.* v. *Bates*, 156 U. S. 577, 589. *Kelley* v. *Rhoads*, 188 U. S. 1, 7. *General Oil Co.* v. *Crain*, 209 U. S. 211, 230. By sending them into Pennsylvania and by his omission to have them returned to New York and his lack of definite intention ever so to do Clarke failed to maintain an actual situs in New York and created one for them in Pennsylvania. The principle applied in *Frick* v. *Pennsylvania, supra*, 490-494, and in *Blodgett* v. *Silberman*, 277 U. S. 1, 18, governs this case.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*